STATE OF MICHIGAN

COURT OF APPEALS

JACOB S. STANKE, a minor, by his Next Friend, ISABELLA BANK AND TRUST, and ISABELLA BANK AND TRUST, as Trustee of the JACOB S. STANKE Trust Agreement,

Plaintiff-Appellant,

v

LINDA J. STANKE,

Defendant,

and

VARNUM, RIDDERING, SCHMIDT, and HOWLETT, L.L.P.,

Defendant-Appellee.

UNPUBLISHED
January 24, 2008

No. 263446
Isabella Circuit Court
LC No. 04-003305-NM

On Remand

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court, which, in lieu of granting leave to appeal, vacated our prior judgment affirming the circuit court's grant of summary disposition to defendant law firm, Varnum, Riddering, Schmidt and Howlett, L.L.P., pursuant to the attorney judgment rule. *Stanke v Varnum, Riddering, Schmidt and Howlett, LLP*, entered October 31, 2007 (Docket No. 133834). The Supreme Court determined that we improperly affirmed the order granting summary disposition on the attorney judgment question as if the motion had been filed under MCR 2.116(C)(10). We agree with plaintiff that the circuit court erred in granting defendant's motion for summary disposition pursuant to the attorney judgment rule under MCR 2.116(C)(8). However, we now conclude that the circuit court properly granted summary disposition to defendant on the basis that there was no attorney client relationship between Jacob Stanke (Jacob) and defendant regarding the actions underlying plaintiff's malpractice claims, and because plaintiff has already obtained judgment against Linda Stanke for the full amount of the injuries alleged in the complaint.

As we noted in our prior opinion, then five-year-old Jacob was injured on April 27, 1996, at a "Mini Grand Prix" event in Mount Pleasant. On May 10, 1996, Jacob's mother, Linda Stanke (Stanke), retained defendant to pursue a personal injury claim against the organizers of that event and others. On July 25, 1996, Stanke, through defendant, successfully moved to be appointed Jacob's next friend. On that same day, defendant filed a personal injury lawsuit, on behalf of Stanke as Jacob's next friend. Stanke agreed to settle that lawsuit following mediation. As required by MCR 2.420, defendant moved the circuit court to approve the settlement and to place the net proceeds of the settlement in the Jacob S. Stanke Trust. Defendant attached a copy of the trust document, signed by both Jacob's parents and designating Stanke as trustee and Jacob's father, Jeffrey Stanke (Jeffrey) as successor trustee, to its motion. On May 1, 1998, the circuit court approved the settlement, authorized payment of defendant's contingency fee and Jacob's outstanding medical bills from the proceeds, and authorized establishment of the Jacob S. Stanke Trust (trust), pursuant to the trust document attached to defendant's motion "for Jacob's benefit to hold the remaining proceeds of the lawsuit."

Thereafter, on May 23, 1998, with Jeffrey's consent, defendant filed a petition in the probate court to appoint Stanke as Jacob's conservator and to approve the transfer of the net settlement proceeds to her to be placed in trust for Jacob. Defendant attached copies of the circuit court's order approving the personal injury settlement and the document establishing the trust to this petition. On June 24, 1998, the probate court appointed Stanke as Jacob's conservator, approved use of the trust as a receptacle for the settlement proceeds, authorized the deposit of the settlement proceeds into the trust, and ordered that an Acceptance of Trust be filed. The probate court did not order that a bond be posted. On July 28, 1998, the circuit court entered a stipulated order of dismissal of the underlying personal injury lawsuit. Thereafter, the net settlement proceeds were transferred into Jacob's trust and, on August 31, 2000, Stanke was discharged as Jacob's conservator.

On January 7, 2003, plaintiff Isabella Bank and Trust, as next friend for Jacob and successor trustee of the trust, ("plaintiff") filed the instant complaint alleging that Stanke had wrongfully depleted the trust assets by more than $207,000 in violation of her fiduciary duty to Jacob as trustee, and that defendant committed legal malpractice by drafting the trust documents in a manner allowing Stanke to wrongfully deplete the trust, by representing to the circuit court that the trust contained adequate safeguards to protect the settlement funds, by allowing the trust to be established without a bond being posted, and by allowing Stanke to be appointed trustee. Stanke failed to appear to defend in this action, and plaintiff obtained a default judgment against her for the full amount of the funds she wrongfully depleted from the trust. Thereafter, defendant filed three separate motions for summary disposition, asserting (1) that it had no attorney-client relationship with Jacob, (2) that its actions underlying plaintiff's claims of malpractice were protected by the attorney judgment rule and that plaintiff was collaterally estopped from challenging those actions, and (3) that plaintiff allocated 100 percent of the fault for Stanke's wrongful depletion of trust funds to Stanke, and thus, there was no basis for

recovery against defendant. The trial court granted each of defendant's three motions; plaintiff asserts that these decisions were erroneous.[1]

This Court reviews a circuit court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Defendant filed its motion for summary disposition based on the lack of an attorney-client relationship pursuant to both MCR 2.116(C)(8) and (10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone and may not be supported with documentary evidence. *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, and are construed in the light most favorable to the nonmoving party. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair*, *supra*. "A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party is entitled to judgment as a matter of law if the claim suffers a deficiency that cannot be overcome." *Driver v Hanley* (*After Remand*), 226 Mich App 558, 562; 575 NW2d 31 (1997) (internal citations omitted).

"In order to establish a claim for legal malpractice, a plaintiff must prove (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of the injury, and (4) the fact and extent of the injury alleged." *Coble v Green*, 271 Mich App 382, 386; 722 NW2d 898 (2006). We agree with the trial court that plaintiff cannot establish the existence of an attorney-client relationship between Jacob and defendant in the proceedings that give rise to plaintiff's allegations of malpractice, and therefore, plaintiff's malpractice claim necessarily fails.

According to the Michigan Court Rules, an action must be prosecuted in the name of the real party in interest. MCR 2.201(B). "A real party in interest is one who is vested with a right of action in a given claim, although the beneficial interest may be with another." *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702, 705; 698 NW2d 402 (2005), aff'd in part and rev'd in part on other grounds, 479 Mich 336 (2007). A minor cannot sue on his or her own behalf. MCR 2.201(E)(1). Therefore, if a minor is not represented by a conservator, a next friend must be appointed to pursue an action on behalf of the minor. MCR 2.201(E)(1)(b). The next friend "commences an action on behalf of a minor plaintiff and *represents* such *plaintiff* under supervision of the court." *In re Powell*, 160 Mich App 704, 713; 408 NW2d 525 (1987) (emphasis in original). The legal action is brought in the name of the minor by the next friend. *Marquette Prison Warden v Meadows*, 114 Mich App 121, 124; 318 NW2d 627 (1982). The next friend is the real party in interest in the action, while the beneficial interest rests with the minor. MCR 2.201; *Rohde*, *supra*. See also, Black's Law Dictionary, (8th ed, 2004), [a real

[1] As noted earlier, we agree with plaintiff regarding the grant of summary disposition based on the attorney judgment rule.

party in interest is "[a] person entitled under the substantive law to enforce the right sued upon and who generally, *but not necessarily*, benefits from the action's final outcome" and the "real-party-in-interest rule" is "[t]he principle that the person *entitled by law to enforce a substantive right* should be the one under whose name the action is prosecuted" (emphasis added)]; and *Cotter v Britt*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2007 (Docket No. 274776). Thus, Stanke was the real party in interest in the circuit court action, while Jacob held a beneficial interest in that action.

By court rule, where a next friend is appointed on behalf of a minor, the next friend is responsible for the costs of the action. MCR 2.201(E)(1)(b). Further, the next friend has the authority to retain legal representation and terminate that legal representation, as well as to direct the legal proceedings on behalf of the minor, subject to approval of the court. *In re Makarewicz*, 204 Mich App 369, 373; 516 NW2d 90 (1994). Here, it is undisputed that Stanke, as next friend of Jacob, retained defendant to prosecute the tort action in circuit court and that all of the pertinent papers were filed by defendant on Stanke's behalf, in that capacity. It was from Stanke that defendant received direction; it was her decision to file the lawsuit and to settle it. Were this not so, there would be no need for circuit court review to assure that the settlement is fair to the minor, as required by MCR 2.420(B). Defendant presented the terms of settlement to the circuit court, along with the document establishing the trust as a receptacle for that settlement. After a hearing, the circuit court determined that the settlement was "reasonable, fair and in the best interests of" Jacob and it approved the settlement to be placed in trust in accordance with the trust documents drafted by defendant for that purpose.

The probate proceedings, during which the proceeds of the settlement were placed into the trust, were undertaken by defendant on behalf of Stanke, as Jacob's mother, to have her named as Jacob's conservator. Once Stanke was named conservator, defendant acted on her behalf in that role. An attorney appearing in a probate matter on behalf of a fiduciary, including a conservator, represents that fiduciary. MCR 5.117(A); MCL 700.1104(e). Thus, there can be no doubt that defendant represented Stanke at all times in the probate court proceedings.

Defendant was retained by Stanke to represent her in prosecuting and settling tort claims on behalf of Jacob; defendant was not acting as Jacob's guardian ad litem. To the extent that Stanke's interests diverged from Jacob's at any point in the proceedings, it was incumbent upon the court to determine the fairness of the course of action proposed by Stanke, and/or appoint a guardian ad litem to represent Jacob's interests. MCR 2.420(B); MCR 5.121(A). Defendant's obligation was to adhere to the direction provided by Stanke, who in turn had a duty to act in good faith on behalf of Jacob.

Plaintiff asserts that a determination that defendant represented Stanke, and not Jacob, leaves Jacob unprotected in the legal proceedings adjudicating his rights. However, plaintiff overlooks the fact that, as Jacob's next friend, Stanke unequivocally owed Jacob certain duties, including to prosecute the action on his behalf, in good faith. If Jacob believes that Stanke breached those duties, he can take—and indeed, he has taken—legal action against her. Similarly, if defendant's representation of Stanke was deficient, because defendant acted negligently in pursuing Stanke's chosen course, then Stanke has a malpractice claim against defendant. However, on the circumstances presented here, we conclude that Jacob, not being defendant's client, has no cause of action against defendant arising out of defendant's

representation of Stanke in connection with either the circuit court or probate court proceedings to prosecute and settle the underlying tort claims.[2]

Further, even were we to determine that Jacob was defendant's client in the underlying proceedings, we agree with the trial court that plaintiff has no claim against defendant because plaintiff has already received a judgment against Stanke for the full amount of the damages alleged in plaintiff's complaint.

MCL 600.2957(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304 [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

MCL 600.6304 states, in pertinent part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, *unless otherwise agreed by all parties to the action*, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury . . . . [Emphasis added.]

Plaintiff asserts that entry of the default judgment by the court clerk, upon plaintiff's application and representation that the "amount due" from Stanke was the entire amount alleged

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[2] Plaintiff asserts that, even in the absence of an attorney-client relationship between Jacob and defendant, Jacob can pursue the instant action against defendant pursuant to an exception based on the doctrine of equitable subrogation discussed in *Beaty v Hertzberg & Golden, PC*, 456 Mich 247; 571 NW2d 716 (1997), and/or the third-party beneficiary exception set forth in *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996). However, plainly, neither exception applies. Plaintiff has not paid a debt for anyone else and has another remedy for the alleged loss—to sue Stanke, which plaintiff has done successfully. Therefore, equitable subrogation does not apply. *Beaty*, *supra* at 256. And, there is no allegation that defendant drafted the trust documents in a manner negligently effectuating Stanke's intent. Rather, plaintiff's claim is that defendant drafted the documents exactly as Stanke intended, to Jacob's detriment. Thus, the *Mieras* exception is inapplicable.

in the complaint, did not meet the statutory requirement that the trial court "allocate" fault as between Stanke and defendant as required by the statute. Plaintiff is correct that MCL 600.6304 provides that the trial court "shall make findings" indicating the percentage of fault of all persons contributing to the injury alleged in the complaint, and that the term "shall" connotes mandatory action. *Salter v Patton*, 261 Mich App 559, 565; 682 NW2d 537 (2004). However, plaintiff overlooks the fact that, as emphasized above, such allocation is only required "unless otherwise agreed" by the parties to the action. MCL 600.6304(1). Plaintiff affirmatively represented in its request for entry of a default judgment against Stanke that Stanke was responsible for the entire amount of the damages alleged in plaintiff's complaint, together with interest and costs. By this document, plaintiff represented to the court that Stanke was responsible for 100 percent of the alleged damages and requested that the court enter judgment on that basis. Defendant did not object; therefore, it implicitly agreed. As a result, we find that the parties waived the requirement that the trial court formerly allocate fault, as permitted by MCL 600.6304.

Plaintiff affirmatively requested that the court enter judgment against Stanke for the full amount alleged in its complaint. When the trial court did so, there remained no more fault to be apportioned to the defendant. Additionally, the doctrine of judicial estoppel prevents a party from taking a subsequent position inconsistent with a position it successfully asserted earlier, where, as here, the court accepted the earlier position as true. *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994).

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette